(3)

No. 89-1984

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRANK L. WHITMER and JOAN P. WHITMER,
Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R.B. HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H.H. ROBERTSON CO., H.H. ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H.S. NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L.C. KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether there is a conflict among the U.S. Courts of Appeals on the issue of whether an appeal from a non-final, non-appealable order should be treated as a petition for writ of mandamus where all of the federal circuits addressing this issue have held that the decision is entirely discretionary.

(2) Whether an order granting an intradistrict transfer of venue pursuant to 28 U.S.C. § 1404(a) is an appealable order conferring jurisdiction upon the Federal Circuit Court where such order is not final within the meaning of 28 U.S.C. § 1291, nor appealable as a matter of right on an interlocutory basis pursuant to 28 U.S.C. § 1292(b), nor a collateral order meeting the requisites of the *Cohen* collateral order doctrine (*Cohen v. Beneficial Finance Loan Corp.*, 337 U.S. 541 (1949)).

LIST OF PARTIES

The parties are those identified in the caption. In compliance with U.S. Supreme Court Rule 29.1, GENERAL PARKING CORPORATION states that it has no parent company or subsidiaries.

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Respondent, GENERAL PARKING CORPORATION, respectfully requests that this Court deny the petition for writ of certiorari seeking review of three orders of the Seventh Circuit on the basis that the petition presents no question of general importance, and there is no conflict among the Federal Circuit Courts on the issues presented by the petition.

OPINIONS BELOW

On December 14, 1989, the United States Court of Appeals for the Seventh Circuit dismissed petitioners' appeal from the order of the United States District Court, Northern District of Illinois, Western Division, dated October 2, 1989, which transferred the venue of petitioners' action from the Western Division of that Court to the Eastern Division, premised upon its lack of jurisdiction to hear the appeal. The Court of Appeals held that the order transferring venue was not appealable as a matter of right pursuant to 28 U.S.C. § 1291 because the order did not dispose of the case, nor was it a collateral order falling within the *Cohen* doctrine. The Court further held that the order was not appealable on an interlocutory basis because the district court denied certification of the matter under § 1292(b). (The order is reproduced as Appendix A to the petition).

The Court of Appeals' second order dismissed the petitioners' appeal from the district court's denial of certification of an interlocutory appeal under 28 U.S.C. § 1292(b). (The order is reproduced in Appendix B to the petition).

In its third order, dated January 16, 1990, the Seventh Circuit Court of Appeals denied petitioners' motion to re-

consider both of the December 14, 1989 orders, and denied all further relief sought in connection with petitioners' filing in the Seventh Circuit. (The order is reproduced in Appendix C to the petition).

In its orders of December 14, 1989 and January 16, 1990, the Court of Appeals noted petitioners had the option of filing a petition for writ of mandamus challenging the District Court's denial of their motion to transfer venue. To date, a petition for writ of mandamus with the Court of Appeals has never been filed.

None of the Court of Appeals or District Courts' orders are reported. They are reproduced in the petitioners' appendices.

JURISDICTION

The orders from which petitioners seek review were entered on December 14, 1989, and rehearing thereon was denied on January 16, 1990. The petition for writ of certiorari therefrom was filed within ninety (90) days, and the jurisdiction of this Court is invoked by petitioners under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1404. Change of venue

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292. Interlocutory decisions

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1254. Court of appeals; certiorari; certified questions

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

REASONS WHY CERTIORARI SHOULD BE DENIED

PREFATORY NOTE:

THE FACTS AND ISSUES PRESENTED BY PETITIONERS WHICH ARE NOT PROPERLY BEFORE THIS COURT.

This appeal can present only two questions for review, both of which are procedural. Petitioners herein sought review of the district court's orders transferring the venue of this action pursuant to 28 U.S.C. § 1404(a) and denying certification for interlocutory review of the issue whether that transfer was appropriate. Because the Seventh Circuit had no jurisdiction to hear petitioners' claims on any of the asserted jurisdictional bases, it could not consider the merits of petitioners' claims that the intradistrict transfer was improper. Accordingly, the only questions to be considered in this Honorable Court are jurisdictional as well—namely:

(1) Whether the Seventh Circuit's discretionary determination to not treat the premature appeal as a petition for writ of mandamus presented a departure from the principles guiding other Federal Courts of Appeals; and

(2) Whether the Seventh Circuit was correct in its determination that it had no jurisdiction.

Therefore, in accord with its obligation under U.S. Supreme Court Rule 15.1, Respondent herein objects to most of petitioners' so-called facts (consisting mainly of blatant misstatements of the record interspersed with petitioners'

subjective observations and impermissible diatribe)[1], wholly irrelevant to the limited procedural issues presented for review, and in violation of this Court's Rule 14.1(g).

Furthermore, Respondent objects to issues 1, 2, 3, 5, 6, 8, 9, and 10, presented by petitioners, as not being within the scope of the issues which may be brought before this Honorable Court.[2] Moreover, those issues not having been properly raised before the Seventh Circuit, are waived. *See Michel v. Louisiana*, 350 U.S. 91 (1955); *Yakus v. United States*, 321 U.S. 414, 444 (1944).

I.

ALL FEDERAL APPELLATE COURTS CONSIDERING THE ISSUE OF WHETHER A JURISDICTIONALLY-DEFECTIVE NOTICE OF APPEAL SHOULD BE TREATED AS AN APPLICATION FOR MANDAMUS ARE IN ACCORD: THE ISSUE IS ONE OF DISCRETION.

There are no cases from the federal courts of appeals which hold that a notice of appeal must be treated as a petition for writ of mandamus. All of the courts of appeals which have considered the matter have held that the determination is a discretionary one; if the Circuit Court so chooses, it may treat a defective application for appeal as a petition for writ of mandamus, but it need not do

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[1] Specifically, Respondent objects to the entirety of the "Statement of the Case" and its subparts, "Medical Disability Opposition to Change of Venue" and all its subparts, "Denial of Meaningful Due Process . . ." and all of its subparts.

[2] Accordingly, petitioners' discussion of reasons for granting the writ, commencing with "This case also involves toxic torts" *through and including* "Toxic discovery denial by defendants" should be disregarded in its entirety.

so.[3] In this case the Seventh Circuit chose not to do so. Rather, the Court suggested, on two occasions, that if petitioners desired a writ of mandamus, they should submit a proper petition. Why petitioners herein have chosen not to do so is beyond the realm of comprehension.

II.

NONE OF THE DISTRICT COURT'S ORDERS CHALLENGED BY PETITIONERS WAS APPEALABLE; ACCORDINGLY, THE SEVENTH CIRCUIT DID NOT ERR IN DISMISSING PETITIONERS' APPEALS FOR LACK OF JURISDICTION.

The only other question presented by the petition herein is the propriety of the Seventh Circuits' orders of December 14, 1989, dismissing plaintiffs' appeals, and its order of January 16, 1990, refusing to reconsider the December 14, 1989 orders. Quite simply, the Seventh Circuit had no other choice—it had no jurisdiction to entertain petitioners' appeal from either the order transferring the case from the Western Division of the Northern District of Illinois to the Eastern Division of the Northern District of Illinois, nor did it have jurisdiction to review the District Court's refusal to certify the question of intradistrict transfer for interlocutory review pursuant to 28 U.S.C. 1292(b).[4]

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[3] *See* pages 8-10 of Respondents John Hancock Mutual Life Ins. Co. and Sudler and Co.'s Response to the petition herein. Inasmuch as that Response cites all of the relevant authorities, and in the interest of brevity, that discussion will not be repeated by this Respondent.

[4] *See* discussion of Respondent John Hancock Mutual Life Ins. Co. and Sudler and Co.'s Response to the petition at pages 10-12 (Section II). As the authorities cited therein completely address the issue, they will not be repeated in the interest of brevity.

CONCLUSION

Petitioners' petition for writ of certiorari should be the last meritless pleading filed by petitioners. The Seventh Circuit, on two separate occasions, pointed out the jurisdictional, and therefore fatal, defects to petitioners' appeals. But more importantly, the Seventh Circuit also advised petitioners of the proper method in which to present the issue of the propriety of the interlocutory venue transfer. Petitioners have yet to heed that advice.

Because petitioners can present no authority demonstrating that the Seventh Circuit was required to treat their defective appeal as a petition for a writ of mandamus or that the Seventh Circuit had jurisdiction over the appeal, the petition for writ of certiorari should be denied.

Respectfully submitted,

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